PROTECT YOURSELF

BEFORE IT'S TOO LATE: Secure Your Intellectual Property

by Robyn Volkening

OUR INDUSTRY'S CREATIVE entrepreneurs burst with new ideas, inventions, fun designs, and interesting ways of doing things. Eager to get feedback, get their product out to the customer, and make money, they rush to build samples for the next trade show or to share their product on social media. A new, potentially lucrative idea is exciting! You've invested a lot of thought and effort into development, and you want to see a return on the mental energy and financial costs.

Not wanting to put a damper on the creativity and enthusiasm, or get mired down in boring paperwork, business owners and designers often don't think about how to protect their ideas and their future income. They don't consider the potential dangers from folks looking to borrow ideas, creatively copy, or flat-out "knock them off." But it's imperative to think through and allocate resources to protect your intellectual property via copyrights, trademarks, and patents—sooner, rather than later.

FIRST, SOME TERMS:

COPYRIGHT: You can copyright art, literature, and film. In fashion, you can copyright patterns, ads, your website, or your logo. A copyright is relatively easy and inexpensive to obtain, and the U.S. Copyright Office (www.copyright.gov) has a tutorial for the do-it-yourselfer. For a nominal fee, you can file electronically, if you meet the copyright requirements. Copyrights can protect you internationally under mutual treaties and are currently good for individual works for the lifetime of the creator plus 70 years.

In the Western and English lifestyle industry, we most likely seek copyright protection for our websites, stating that we own the words and content and that no one can copy and paste materials without permission. We also need to be aware of copyright laws when we are using photographs. The copyright for a photo automatically belongs to the photographer, even if your company purchases a licensed copy of the photo for an ad, or paid for a whole shoot. Unless a legal photo release (and typically fees depend on anticipated usage) changes the ownership, the photographer who created the work owns the photo and all rights to it for future use. Third parties (endorsees, for instance) cannot transfer their rights to a company for photo usage without explicit written permission from the photographer.

TRADEMARK: This is a source identifier of goods and services for the consumer. According to the U.S. Patent and Trademark Office (www.uspto.gov), you may apply to register a trademark on a word, phrase, symbol, or design that identifies and distinguishes the source of the goods of one party from those of others. If someone buys a product with a trademark, they may expect it to be of similar quality to others of that mark. It does not necessarily protect the manufacturer, since a trademark comes from actual use, so it needs to be continually kept consistent, and kept in use, in order for you to protect your mark.

If you're still unsure of your knowledge or don't want to take time away from your design and product development, consult with an intellectual property attorney who can be your partner throughout the process.

You can register your trademark with the USPTO in order to assert ownership for exclusive usage on specific goods set forth in the documentation. If the mark is registered, use the ® symbol after it; if it is not registered, you designate it with the **TM** symbol.

One area of trademark used in the fashion industry is a "trade dress," which is a unique non-traditional identifying mark, such as the red Louboutin sole on that company's well-known footwear. Unlike copyrights, trademarks do not protect you in other countries; they must be filed separately for each country in which you do business. The U.S. has a treaty system allowing you to file in other countries through the USPTO.

Many small companies believe that they don't have the money to hire an attorney or go through the copyright/ trademark protection process. However, the future value comes from "owning" the idea or design.

PATENT: Much more intense and expensive to obtain, a patent has to be a unique, *new* invention or novel composition that is not obvious or known to people in that industry. A patent is limited and cannot be expanded. There are design patents, utility patents for unique materials, and others specific to industries. Patents are very difficult to process, and a lawyer can advise you on how to protect your invention and capitalize on future markets and uses. Design patents expire after 15 years from the filing date and need to be monitored and reviewed, or someone else can take over the patent. Patents are not international; they must be filed separately for each country in which you do business just like trademarks.

The USPTO website is a reliable resource for studying intellectual property terms and how to use laws to assist with your products and businesses. However, if you're still unsure of your knowledge or don't want to take time away from your design and product development, consult with an intellectual property attorney who can be your partner throughout the process.

Mona Qureshi-Hart, an intellectual property attorney with Hart IP Law & Strategies in Golden, Colorado, has worked with numerous Western lifestyle businesses to protect their products and designs. She suggests that entrepreneurs interview many IP lawyers to find one that fits their personality and size of business. Industry affiliation can be important, as the lawyer or firm may already have an idea on competition or terms to research. However, an IP firm or lawyer cannot represent competitor products directly, as that may present a conflict of interest.

What does an IP lawyer do that you can't do yourself? The expertise of an IP attorney can help you harvest, develop, and protect your intellectual property, so you can properly allocate resources, protect what is yours, and set yourself up for future success.

Qureshi-Hart says that the research component involved in intellectual property protection can be daunting for those not well-versed in where to search or what terms to search for. A lawyer will make sure you are thorough in your application. This saves time and revisions, which may not be possible if information is filed improperly. She advises that even if you don't have a large budget, it's crucial to involve an IP lawyer in the beginning of the design or development process in order to make sure you aren't spending money on a product that you can't take to market.

If you spend money on samples or prototypes, develop a website and marketing materials, and then later discover that someone else has a copyright, trademark protection, or a patent, you can be forced to stop before you even recoup your investment, let alone make any profit. A cease and desist letter can halt your fledgling empire before it even begins, and without appropriate documentation, it is difficult to legally prove you had the idea first.

To avoid this devastating outcome, an IP lawyer can not only check for potential conflicts or competition, but also set you up with an appropriate copyright, trademark, or patent ahead of when your products will be out in the public eye. They can also help set up non-disclosure agreements (NDAs) with potential manufacturers, factories, and employees or consultants.

How many times have you walked around trade shows, found something unique, and then a few months later saw numerous iterations of the same product for sale? Often larger companies with bigger budgets and resources can jump ahead in production, essentially beating a small company to market with existing distribution or manufacturing relationships. To avoid this, having intellectual property protection in place ahead of public showings is important.

Copyrights can also be helpful for companies that manufacture outside of the U.S. If someone tries to manufacture and import products using your idea when you have the copyright, U.S. Customs can stop the shipment at the border, refuse to allow it into the country, and even destroy the goods.

Many small companies believe that they don't have the money to hire an attorney or go through the copyright/trademark protection process. However, the future value comes from "owning" the idea or design. You own the copyright, and you can always license the product for manufacture, marketing, and distribution, or bring on partners or investors. The copyright serves as proof of ownership and has long-term value, whereas goods that you have produced without proper copyrights or trademarks might not. If you ever sold the company or brand, not owning the intellectual property would devalue your assets.

Qureshi-Hart says that the time to secure intellectual property protection is when you commit to a design or idea, and determine if it is a benchmark product for your brand or for future business. If you will dedicate resources to it, or see it becoming a large part of your future product line or expansion, you should seek to obtain a copyright before investing time and money into production or marketing.

If the idea or product is just a one-off design that you don't see as a long-term area of business or income, or it's not the basis for more products in the future, perhaps it is not worth the time or resources for a copyright or trademark. But without doing the due diligence, you can easily go down a tumultuous path.

Everyone wants to have the next big thing and to capitalize on a hot trend in the market. Take the steps to legally protect design, invention, or brand via intellectual property channels, or you may be setting yourself up for disappointment, lost investment, and the dismay of watching someone else profit from your idea.